

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

BASIL AUGUSTUS PERRY,

Defendant-Appellant.

UNPUBLISHED

June 14, 2007

No. 270283

Monroe Circuit Court

LC No. 05-034243-FH

Before: Fitzgerald, P.J., and Sawyer and O’Connell, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of one count of child sexually abusive activity, MCL 750.145c(2), and four counts of third-degree criminal sexual conduct, MCL 750.520d(1)(a). He was sentenced as an habitual offender, third offense, MCL 769.11, to concurrent prison terms of 120 to 480 months for the sexually abusive activity conviction and 120 to 360 months for the CSC convictions. He appeals as of right. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant’s sole claim on appeal is that the trial court erred in scoring offense variables 10 and 11 of the sentencing guidelines.

“A sentencing court has discretion in determining the number of points to be scored provided that evidence of record adequately supports a particular score.” *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). “A sentencing court may consider all record evidence before it when calculating the guidelines, including . . . the contents of a presentence investigation report . . .” *People v Ratkov (After Remand)*, 201 Mich App 123, 125; 505 NW2d 886 (1993), remanded 447 Mich 984 (1994). A presentence report is presumed accurate and may be relied on by the trial court unless effectively challenged by the defendant. *People v Grant*, 455 Mich 221, 233-234; 565 NW2d 389 (1997). A scoring decision “for which there is any evidence in support will be upheld.” *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996). This Court reviews the scoring to determine whether the sentencing court properly exercised its discretion and whether the evidence adequately supported a particular score. *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003).

Defendant preserved his objection to the scoring of OV 10 by raising the issue at sentencing. MCL 769.34(10). OV 10 considers exploitation of a vulnerable victim. MCL 777.40. A victim is vulnerable if he or she has a “readily apparent susceptibility . . . to injury,

physical restraint, persuasion, or temptation.” MCL 777.40(3)(c). A victim may be vulnerable due to his or her youth or domestic relationship, and a defendant is to be assessed ten points if he exploited that vulnerability. MCL 777.40(1)(b). The instructions define the term “exploit” to mean “to manipulate a victim for selfish or unethical purposes.” MCL 777.40(3)(b). They also state that the mere existence of a factor such as youthfulness “does not automatically equate with victim vulnerability.” MCL 777.40(2).

The fact that the victims’ ages were an element of the offenses does not preclude an assessment of points for exploitation of youth. *People v Johnson*, 474 Mich 96, 103; 712 NW2d 703 (2006); *People v Cotton*, 209 Mich App 82, 84; 530 NW2d 495 (1995). Further, the record indicates that defendant promised one youth a car if she would arrange a three-way sexual encounter with her younger cousin, who was a temporary member of defendant’s household. Therefore, we find that the record supported the trial court’s scoring of OV 10.

Defendant failed to object to the scoring of OV 11 at sentencing. In fact, his attorney stated on the record that he had no objection to the scoring of other guidelines apart from OV 10. Therefore, defendant’s claim of error has been waived. Cf. *People v Matuszak*, 263 Mich App 42, 57; 687 NW2d 342 (2004); *People v Ortiz*, 249 Mich App 297, 311; 642 NW2d 417 (2002). Even if the issue was not waived, however, defendant has not established a plain error affecting his substantial rights. *People v Endres*, 269 Mich App 414, 422; 711 NW2d 398 (2006). There was evidence that defendant engaged in fellatio, cunnilingus, and vaginal intercourse, each of which constitute sexual penetration. MCL 750.520a(p). Because there was evidence of two sexual penetrations apart from the sentencing offense, a 50-point score for OV 11 was not plain error. MCL 777.41(1)(a).

Affirmed.

/s/ E. Thomas Fitzgerald

/s/ David H. Sawyer

/s/ Peter D. O’Connell